

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1493

To be argued by Steven H. Gifis, Esq.

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

B

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

PHILIP LANDWEHR,

Defendant-Appellant.

ON APPEAL FROM JUDGMENT OF CONVICTION AND SENTENCE
FOR VIOLATION OF 18 U.S.C. § 152 (BANKRUPTCY FRAUD)
IN THE SOUTHERN DISTRICT OF NEW YORK
SAT BELOW: HON. ROBERT J. WARD, U.S.D.J.

**BRIEF ON BEHALF OF
DEFENDANT-APPELLANT**

STEVEN H. GIFIS,
Attorney for Defendant-Appellant,

68 Bayberry Road,
Princeton, New Jersey 08540
(609) 466-3550

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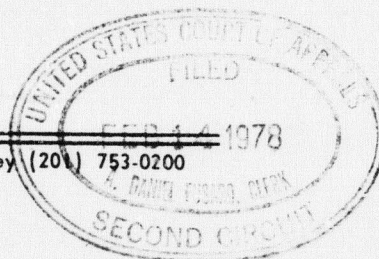


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STEVEN H. GIFFS
ATTORNEY AT LAW
68 BAYBERRY ROAD
PRINCETON, N. J.
08540
(609) 466-3550

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. May the trial court at sentencing disregard a potential "plus" of a defendant's alleged cooperation with the Government by treating that factor as a "zero" in the face of the defendant's request for an evidentiary inquiry into the disputed issue?

2. In the instant case where the nature of the defendant's cooperation is disputed and a letter informing the court of the nature, extent and value of the cooperation on its face appears to have been modified from "cooperative" to "un-cooperative" and the author of the letter is not present at the sentencing, has the defendant been denied rights of confrontation and due process of law? In this context, was the failure of the trial court to afford an evidentiary inquiry, an abuse of discretion requiring remand and re-sentencing?

3. Where a defendant pleads guilty and the Government agrees to inform the trial court at sentencing of "the full nature, extent and value" of the defendant's cooperation as a part of that plea bargain, does the conclusory assertion, at time of sentencing by the Government satisfy the plea agreement where the defendant disputes that conclusion and demands an evidentiary inquiry into the accuracy and fairness of the Government's report to the court?

STATEMENT OF THE CASE

Defendant PHILIP LANDWEHR was charged in Indictment 77-0196, Filed March 17, 1977, with conspiracy to commit bankruptcy fraud, thirty counts of bankruptcy fraud, one count of perjury before the Bankruptcy Court of the United States District Court for the Southern District of New York and one count of obstruction of justice of an investigation being conducted by the Interstate Commerce Commission. Three other persons were named in this indictment as co-conspirators and in various counts: Michael Daspin, Lu Wood, and Gerald Griffin.

A distinct but related indictment was returned by the grand jury sitting in the District of New Jersey, 77-0115, on March 21, 1977, naming defendant PHILIP LANDWEHR and co-defendant Michael Daspin [from the New York indictment] and several other persons in fifteen counts of conspiracy to commit bankruptcy fraud, bankruptcy fraud and obstruction of justice. On May 23, 1977 this indictment was dismissed. A new indictment was returned, 77-0238 on June 20, 1977, naming the same persons for thirteen counts of similar offenses.

The New York and New Jersey indictments proceeded to trial simultaneously with defendants in common (LANDWEHR and Daspin) required to prepare pre-trial motions and general trial preparation simultaneously for each indictment. After extensive plea negotiations, an agreement was reached between defendant PHILIP LANDWEHR and the United States. By the terms of that agreement (Da- 17) defendant agreed to plead guilty to one count of

STEVEN H. GIFIS
ATTORNEY AT LAW
68 BAYBERRY ROAD
PRINCETON, N. J.
08540
(609) 466-3550

bankruptcy fraud and the Government agreed to dismiss the other 32 counts in the New York indictment and to dismiss in its entirety the New Jersey indictment. As a condition of his plea agreement, the defendant PHILIP LANDWEHR agreed to "cooperate forthwith" with both Districts "by providing complete, candid and truthful information". (Da-19) In turn the Government agreed "prior to the time of sentencing ...[to] advise the Court and the defendant of the full nature, extent and value of the cooperation given by defendant PHILIP LANDWEHR to the United States of America." (Da-18)

Defendant entered a guilty plea to Count 30 of the present indictment before the Honorable Robert J. Ward, U.S.D.J. on August 16, 1977. The Court was advised of the agreement and a copy of the written agreement was filed with the Clerk on that date. The particular count of the indictment to which defendant LANDWEHR admitted his guilt was the filing with the Bankruptcy Court of a false statement of operating profit for a particular reporting period. Defendant did not himself file this report but he admitted directing it to be filed, knowing that losses rather than profits had been in fact experienced during the reporting period. Had these losses been revealed, the Court may have terminated the Chapter XI protection being afforded the subject trucking company during an attempted reorganization under the Court's protection. Eventually the company did fail and was adjudicated a bankrupt.

Thereafter, the defendant had many meetings with representatives of the District of New Jersey investigating some unrelated matters

which the Government believed defendant LANDWEHR had personal knowledge about. At first, defendant LANDWEHR was less than completely candid about these matters, concerned about the integrity and viability of the plea agreement which permitted the use of disclosures against him if the Government rescinded the agreement due to his violation. (Da-19 to Da-20) However, after counsel interceded, meetings and discussions became more satisfactory and it was ultimately agreed that defendant would testify under a grant of immunity before the grand jury sitting in the District of New Jersey. Permission was sought and obtained by the Government to confer the requisite immunity upon defendant.

Defendant was scheduled to testify before this grand jury as per his plea agreement on November 9, 1977. On November 4, 1977, Mr. Gino Gallina, a New York attorney and former assistant district attorney in Manhattan was killed, gangland-style. Mr. Gallina was a witness in the New Jersey investigation as was defendant LANDWEHR. As a result of this murder, the Government cancelled LANDWEHR's appearance before the grand jury in the District of New Jersey and requested that he postpone his sentencing indefinitely until in their opinion he could safely testify before that body. The Government also offered defendant protection which he declined. He also declined to further postpone his sentencing [already well beyond the 45 day period of the Speedy Trial Plan] and stated that he would testify before the grand jury when so requested. Defendant wanted the uncertainty about his sentence to be ended. If the Government was dissatisfied with his performance in the grand jury, it was free to seek an indictment for perjury before that body and to prosecute same. *

*The above version of the background of the factual issue of defendant's cooperation was set forth by counsel at the sentencing and would have been developed through an evidentiary inquiry had the trial court permitted same. See Da-74 to 79 .

Because defendant refused to postpone indefinitely his sentence, the Assistant United States Attorney for the District of New Jersey sent a letter bearing the date [revised] of November 17, 1978 to the Honorable Robert J. Ward, concluding that defendant had been "extremely uncooperative." (Da-94). An examination of that letter suggests very strongly that not only was its date changed from November 1, 1977 to November 17, 1977 but so was its vital conclusion. The original draft said defendant had been "extremely cooperative." The "-un" was clearly added to the text of the letter. Defendant denied that he was uncooperative and asked for an evidentiary hearing should that factor become material in the court's sentence. (Da-79, 6-12) The court responded by saying that in his court cooperation was never a "minus", only a "plus" or a "zero." Since the Government had stated that defendant was not cooperative he would receive a "zero" for this factor. But the court assured defendant he would not be punished.

Defendant was sentenced to a term of three years incarceration. By comparison the other two co-defendants who were convicted in New York received probation and fines of two years and five years respectively. (Da-96-97) Co-defendant Daspin who was sentenced in the District of New Jersey received a sentence of 18 months on January 27, 1978. All of these defendants cooperated with the Government investigation as did defendant LANDWEHR.

Defendant filed a timely Notice of Appeal, sought and was denied bail pending his appeal from the trial court. A scheduling order issued on December 16, 1977 which was modified on motion January 26, 1978 setting February 9, 1978 as the deadline for the filing of defendant-appellant's brief and appendix.

The Introductory Note which follows contains a summary of the appellate argument.

INTRODUCTORY NOTE

This is an appeal from the imposition of a three-year custodial sentence for bankruptcy fraud upon a defendant who entered into a plea agreement with the Government. As a part of that plea agreement he was to "cooperate" with the Government. In turn the Government agreed to report to the court and to the defendant prior to sentencing as to the "full nature, extent and value" of his cooperation. At his sentencing the defendant contended that he did cooperate fully and that he was prepared to testify before a federal grand jury as to the matters under investigation. The court was informed through a letter from an Assistant United States Attorney (who was not present at the sentencing) that despite the frequent meetings between the Government and the defendant that he was "extremely uncooperative." The defendant requested a hearing by the sentencing court on the disputed matter and the court's response was to "disregard" the item.

The defendant argues herein that the court's response was improper and his sentencing procedurally defective in that since he would have been rewarded by positive cooperation with the Government by a more lenient sentence than he received, that it was improper and unfair to dismiss the factual issue by saying it

STEVEN H. GIFIS
ATTORNEY AT LAW
66 BAYBERRY ROAD
PRINCETON, N. J.
08540
(609) 466-3550

could have been a "plus" but was not a "minus"---it was a "zero." Defendant contends herein that no potentially mitigating factor, certainly not one as important as cooperation with the Government, can be dismissed by a trial court by disregarding same. While aggravating factors which are contested may properly be ignored and disregarded by a trial court, the same cannot in fairness to the defendant's liberty interests be done for mitigating factors. This appeal presents an opportunity for this distinction to be outlined for the guidance of trial courts faced with factual disputes at the sentencing proceeding.

Any potentially mitigating factor which may be material to a defendant's sentence and which is disputed, must either be accepted by the trial court in defendant's favor or resolved through an appropriate evidentiary inquiry. Not to do so as in this case constitutes an abuse of discretion and also violates defendant's rights to confrontation and due process at his sentencing.

Moreover, defendant urges that where the factual dispute concerns an aspect of his plea agreement, the trial court cannot simply disregard the item since if the defendant is found to be correct that he was entitled to a favorable report on his cooperation (and favorable consideration by the trial court in the duration and nature of his sentence) by the Government, then the failure to fully and fairly report same constituted a violation of the plea agreement. Since defendant has already served a substantial portion of his sentence, appropriate relief would be a remandment for re-sentencing with specific performance of the plea agreement. xii

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN PURPORTING
TO DISREGARD A DISPUTED MATERIAL
MITIGATING FACTOR AFFECTING DEFENDANT'S
SENTENCE.

An Assistant United States Attorney for the District of New Jersey, directed a letter to the trial court via the United States Attorney, for the Southern District of New York, in which he expressed his opinion concerning the defendant's cooperation in an ongoing investigation. The letter was sent pursuant to the plea agreement of August 16, 1977 in which the Government agreed "to advise the court and the defendant of the full nature, extent and value of the cooperation given by Mr. Landwehr to the Government." (Da-18)

The Government did not report the full nature, extent and value of Mr. Landwehr's many trips to their offices and preparedness to testify before a Federal grand jury sitting in Newark. Rather, the Government forwarded a conclusory opinion merely stating that "Mr. Landwehr has been extremely un-cooperative." The prefix "un-" clearly appears to have been added subsequent to the original preparation of the letter.

Defense counsel expressed disagreement with the Government's assertion of un-cooperativeness; citing numerous meetings and conversations between the defendant and the Government. In response, the trial court imposed sentence of three years saying:

"I have a letter from the United States
Attorney which has been mentioned indicating

that the defendant has been "extremely uncooperative." I take that letter and I put it aside. I view cooperation as either a positive plus or a zero. Here, because the government has to tell me if he is cooperative, has chosen not to, I have a zero. The matter is something which while it may have helped Mr. Landwehr in connection with the sentence I am about to impose, will not be used by this Court to penalize him. It is a zero. It is not a minus and it is not a penalty. I have to take the statement of the United States Attorney, whether in his view and judgment, with all the background that he has, there has been a positive assistance rendered by Mr. Landwehr. He has said no. . . ." (J 42 17 T43-6)

Mr. Landwehr's co-defendants were sentenced to two and five years probation respectively in part premised upon their cooperation with the Government. The trial court imposed a three year custodial sentence on Mr. Landwehr. (Da-96 to 97) *

The effect of the court's action, while claiming that it was not influenced by the Government's assertion, was to deny the defendant consideration of this potentially positive "plus" in mitigation of sentence and demonstrates the negative impact of the Government's assertion in view of the disparate sentences imposed upon the other co-defendants.

- A. A disputed material mitigating factor affecting a defendant's sentence may not properly be "disregarded" by the sentencing court without depriving a defendant of fundamental fairness in the sentencing process.

The actions by the trial court, refusing to conduct a factual inquiry into the nature and extent of Mr. Landwehr's

* Subsequent to the imposition of defendant's sentence herein the remaining co-defendant, Daspin, received a sentence in the District of New Jersey of 18 months incarceration. Mr. Daspin was a cooperating defendant. Sentence was imposed after several adjournments on January 27, 1978.

cooperation, gives the appearance that the court was negatively influenced by the Government's assertion. It is entirely improper for a trial court to give weight to a refusal or the allegation of a refusal by a defendant to cooperate with the Government in imposing sentence. In Re Grand Jury Proceedings, 509 F.2d 1349 (5th Cir. 1975); United States v. Rogers, 504 F.2d 1079 (5th Cir. 1974).

In Rogers, supra, at the time of sentence, the sentencing judge clearly indicated his distaste for Rogers' lack of cooperation. The court made it clear that unless and until Rogers indicated "substantial, material, productive cooperation" the court would not consider a lesser sentence. The sentence meted out to the defendant by the court was harsher than that which would otherwise have been imposed simply because he insisted upon his constitutional right to remain silent. The circuit court recognized that "when it has been made to appear that longer sentences have been imposed by the courts because the defendants refused to confess their guilt and persisted in their claims of innocence we have vacated the sentences." supra at 1085. The court saw no distinction between the instance referred to above and where a defendant was asked to cooperate and refused; ("a distinction without a difference," supra at 1085).

The instant case is a similar factual setting. The trial court refused to accept the defendant's assertion of cooperation. The court resolved the factual dispute by attempting to disregard the entire issue of cooperation. In doing so, without affording

the defendant an opportunity to rebut the Government's allegation of uncooperativeness, a harsher sentence was imposed upon this defendant than that which otherwise would have been imposed. The defendant paid a penalty because of an untested allegation of uncooperativeness by the Government.

The actions by the sentencing court were pre-emptive of the defendant's rights to consideration of a positive mitigating factor and contrary to fundamental fairness. Pursuant to the holding in Rogers, fairness dictates where a trial court improperly treats the issue of cooperation, that this court exercise its supervision powers and remand the case for further proceedings on the issue of cooperation.

It would be permissible for a trial court, in the interests of fairness or justice, to disregard an aggravating factor in imposing a sentence. The action comports with the preservation and protection of a defendant's liberty interests as they are protected by the Due Process Clause of the Fifth Amendment.

However, failure to give effect or to examine a positive or mitigating factor which bears that same liberty interest is in derogation of fundamental fairness guaranteed at sentencing. The factual dispute between a defendant and the government warrants a hardship on a defendant and is an unreasonable acquiescence to the penal interests of the Government and results in a sentence which may not be based on complete and accurate data.

Rule 32(d)(3)(A) obliges the court in its sound discretion to make an appropriate factual inquiry into factually disputed items that may influence its sentence. The absence for consideration of a positive "plus" factor is well within the meaning of this provision. Its exclusion is not a true disregard of the influential input but rather necessarily weighs negatively to the extent that the sentence is other than it would be had the "plus" factor been taken into consideration. For example, if the government alleges that a defendant has a criminal conviction and the defendant denies it and the court indicates that the criminal conviction at issue will be disregarded, that means that the court sentences on the basis that the defendant does not have the criminal conviction at issue with the attendant "plus" of being a first offender. The penal interests of the Government will be served while resolving doubt in, for, or of the liberty interests of the defendant. Similarly, it could not persuasively be argued in sentencing a defendant convicted of malicious mischief that the court may effectively disregard the defendant's allegation of restitution as a factor for consideration in imposing sentence without prejudicing the defendant since that is a clearly relevant and material factor in mitigation of punishment.

The court may disregard negative sentencing influences without prejudice to the defendant. An aggravating factor which is disregarded by the court and thereby inures to the benefit of the defendant to the extent it reduces his custodial sentence is

juristically consistent with the protestions afforded the individual and Governmental action by the 5th, 6th and 14th amendments to the United States Constitution. Therefore, it is reasonable for the court to exercise its discretion in disregarding alleged "organized crime" involvement in a criminal act. However, it is inconceivable that a court would disregard information that an act was an individual aberational act where the contrary allegation was made by the state. Similarly, where a conviction is had for possession of narcotics, it is entirely reasonable for the court to disregard a suggestion, that the possession was for distribution, as a negative factor. It would not however, be reasonable and consistent with our standards of justice or fairness for a court to disregard information that the drug possession was solely for personal use. The sentence would vary in the competing factual dispute concerning a negative aggravating factor, the court, in exercising its discretion by disregarding the negative factor, vindicates the penal interest of the Government associated with the particular conviction without prejudice to the defendant. Where there is a positive mitigating factor, the court may not disregard the factor without sacrificing the liberty interests of the defendant at least to the extent such lenient factors could reasonably be expected to favorably influence the courts sentencing decision.

- E. Where a defendant disputes a material input which might impact upon his sentence the trial court must either accept defendant's version as to that input or conduct an appropriate inquiry and make a finding of fact as to the disputed input.

STEVEN H. GIFIS
ATTORNEY AT LAW
66 BAYBERRY ROAD
PRINCETON, N. J.

08540

(609) 466-3550

Given the dispute as to a potentially positive sentencing input, the trial court should have been required to conduct a factual inquiry concerning the government's allegation of uncooperativeness or accept the defendant's version and accord it what weight it deserves. To do otherwise is to summarily deprive the defendant of consideration for sentencing based upon accurate data to insure proper disposition. The effect of the disregarding of a positive plus factor results in an irretrievable loss of leniency factors which would otherwise mitigate a defendant's sentence.

In addressing the issue of accuracy of sentencing information, the Advisory Committee on the Federal Rules of Criminal Procedure, commenting on the recently enacted disclosure provision of Rule 32(c)(3)(A), stated:

" . . . The Advisory Committee is of the view that accuracy of sentencing information is important not only to the defendant but also to effective correctional treatment of a convicted offender. The best way of insuring accuracy is disclosure with an opportunity for the defendant and counsel to point out to the court information thought by the defense to be inaccurate, incomplete, or otherwise misleading . . . "

Rule 32, Notes of Advisory Committee on Rules, 1974 Amendment, Notes to Subdivision (c)(3)(A).

The policies expressed by the Advisory Committee were rendered ineffectual by the refusal of the trial court to grant a hearing or make some other appropriate inquiry in this case. Factors upon which the Government's conclusion of uncooperativeness is based were never introduced before the court. Rather, the defendant was denied favorable treatment by the court on a bare assertion. To insure an accurate and fair basis for sentencing

trial courts shall not rely upon adversarial judgments by the Government on so vital a mitigating factor as the degree of a defendant's cooperativeness. Only in this manner can the court be assured of a disinterested and proper inquiry into the factual dispute so as to exercise its discretion in a responsible manner avoiding prejudice to a defendant, as occurred here, in failing to recognize a potentially positive factor which would have influenced the sentence imposed.

The Supreme Court has recognized the protection against prejudicial error that the open and vigorous presentation of influential sentencing factors by counsel would present in avoiding abuses of discretion by trial judges in recent decisions involving capital sentencing. The court stated in the case of Gardner v. Florida, 430 U.S. 349 (1977):

"Finally, Florida argues that trial judges can be trusted to exercise their discretion in a responsible manner, even though they may base their decisions on secret information. However acceptable that argument might have been before Furman v. Georgia, it is now clearly foreclosed. Moreover, the argument rests on the erroneous premise that the participation of counsel is superfluous to the process of evaluating the relevance and significance of aggravating and mitigating facts. Our belief that debate between adversaries is often essential to the truth seeking function of trials requires us also to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision on capital cases."

Id. at 360 .

The interests at stake in this proceeding require the same opportunity. The defendant was ready, willing and able to assist the Government. He took affirmative steps to do so. He was

entitled to have those actions considered by the court when it imposed sentence.

The Court should order remand for reconsideration of sentence availing the defendant the opportunity to rebut the Government's contention of un-cooperativeness through an appropriate structured evidentiary inquiry.

POINT II

THE REFUSAL OF THE TRIAL COURT TO ATTEMPT A RESOLUTION OF THE DISPUTE AS TO THE "FULL NATURE, EXTENT AND VALUE" OF DEFENDANT'S COOPERATION CONSTITUTED AN ABUSE OF DISCRETION REQUIRING A REMAND FOR RE-SENTENCING WHERE AN APPROPRIATE INQUIRY INTO THE DISPUTED FACTOR MUST BE MADE.

The trial court did not and could not neutralize a mitigating factor when it imposed sentence on the defendant without serious prejudice to his liberty interests. The court attempted to treat the factual dispute over the issue of the degree of defendant's cooperation as a "zero" with no impact on or influence over the court's sentencing decision. (Da-89; 2) As stated above, the failure to grant recognition of a positive or mitigating factor when imposing sentence is per se prejudicial to a cooperative defendant. It follows, therefore, that the negative influence of the United States Attorney's letter in defendant's sentence was a basic factor in the court's decision to exclude consideration of the defendant's degree of cooperativeness. The defendant denied the validity of the Government's assertion. The trial court refused to grant the defendant the opportunity to explain or rebut the Government's assertion through an appropriate evidentiary inquiry. This refusal constituted an abuse of discretion by depriving the defendant of his right to an accurate sentencing record. Compare Townsend v. Burke, 334 U.S. 736 (1948); United States v. Tucker, 404 U.S. 443 (1972).

The defendant does not seek appellate review here of the length of the sentence imposed by the trial judge. The defendant

takes issue with the judicial process by which the sentence was imposed. The defendant was not permitted to confront directly through a hearing of the adverse conclusory information supplied by his adversary. If the Government's allegation was demonstrably false the court would have no reason to disregard this mitigating factor. The court's consideration of cooperation by the defendant would have had a material role in the court's decision concerning a proper sentence since the trial court plainly stated that defendant's cooperation "may have helped Mr. Landwehr in connection with the sentence I am about to impose. . ."

(Da-88, 23 - 25)

This distinction between the length of a sentence and the process by which it was determined is spelled out in United States v. Bass, 535 F.2d 110, 118 (D.C. Cir. 1976):

"We start from the fundamental proposition that while federal appellate courts lack the power to review the length of a sentence imposed within statutory limits, careful scrutiny of the judicial process by which the particular punishment was determined is a necessary incident of what has always been appropriate appellate review of criminal cases. Dorzynski v. United States, 418 U.S. 424, 94 S. Court. 3042 41 L. Ed. 2d 855 (1974)."

In this case the record shows that the dispute as to defendant's cooperation was genuine and not contrived and thus the very real possibility exists that significant misinformation supplied by the Government infected the decision of the trial court and therefore warrants appellate review and remand for a factual determination of the issue of whether the defendant did or did not cooperate with the Government.

The court in United States v. Bass, supra, considered the issue of an infected decisional process with recitation to authorities in the several districts:

"Courts have not limited their focus to cases in which there was proven reliance on demonstrably false information, however. Rather with increasing frequency, relief has been provided when the sentencing process created a significant possibility that misinformation infected the decision, and prophylactic measures have been developed to guard against this possibility. For example, courts have condemned ex parte submissions by prosecutors to sentencing judges. See United States v. Perin, 513 F.2d 572 (9th Cir. 1975); United States v. Huff, 512 F.2d 66 (5th Cir. 1975); United States v. Rosner, 405 F.2d 1213, 1231 (2d Cir. 1973) cert. denied, 417 U.S. 950, 94 S. Ct. 3080, 41 L.Ed. 2d 672 (1974); United States v. Solomon, 422 F.2d 1110 (7th Cir. 1970) cert. denied, 399 U.S. 911, 90 S. Ct. 2201, 26 L.Ed. 2d 565 (1970); Haller v. Robbins, 409 F.2d 857 (1st Cir. 1969). Several circuits here required disclosure of the substance of any factual information in the presentence report on which the sentencing judge intends to rely."

See United States v. Miller, 465 F.2d 362 (7th Cir. 1974); United States v. Picard, 464 F.2d 215 (1st Cir. 1972); United States v. Daniels, 464 F.2d 126 (3rd Cir. 1972); Baker v. United States, 388 F.2d 931 (4th Cir. 1968). See also ABA Project on Minimum Standards for Criminal Justice, Sentencing Alternatives and Procedures, section 4.4 (App. Draft 1968). It has been held that a defendant's request for an opportunity to rebut information on which the judge relies must be granted. Shelton v. United States, 497 F.2d 156 (5th Cir. 1974); Collins v. Buckoe, 493 F.2d 343 (6th Cir. 1974); United States v. Espinoza, 481 F.2d 553 (5th Cir. 1973)"

Id. at 118 119 (emphasis supplied).

The trial court abused its discretion in refusing to permit the defendant a fair opportunity to confront the adverse conclusory report of his cooperation. Despite its protestations, the court's sentence did rely upon an untested allegation by the Government of a factor which in truth should have been reported by them more favorably. There is no question, of course, but that a trial court may exclude relevant but possibly inaccurate or inadvertently prejudicial material from the sentencing process. United States v. Fatico, 22 Cr. L. 2286 (E.D.N.Y. 1977). However, sub judice the trial court did employ such suggestive and inaccurate information to attempt to neutralize relevant data. The defendant should have been accorded the opportunity to meet that negative input in an appropriate hearing on the merits.

What is required is a sound judicial sense for what is essential to protect a defendant against injustice in sentencing. Summary attempts at neutralizing beneficial sentencing data do not comport with sound judicial sense or the exercise of a proper discretion.

The controlling law in this Circuit concerning the role of the potentially mitigating factor of cooperation is stated in United States v. Malcolm, 432 F2d 809 (2nd Cir. 1970):

"Rule 32(a) Fed. R. Crim. P. requires that 'before imposing sentence the court shall afford' the defendant an opportunity 'to present any information in mitigation of punishment.' There can be no question that a defendant's cooperation in the investigation and prosecution of the murder of a policeman and other serious crimes is highly material to mitigation of punishment not only because the defendant should be rewarded for his services to

the community but also because cooperation with law enforcement authorities is a significant step toward rehabilitation. Clearly, therefore, Malcolm had a right to present all available information bearing on his cooperation with the authorities fully and accurately, correlatively, the court had a duty to listen and to give such information serious consideration. . ."

Id. at 817.

The Malcolm case is dispositive here. The defendant should have been permitted consideration concerning whatever efforts were made by him in cooperation with the Government. The trial court erred in not allowing him to do so and compounded the error by purporting to disregard the information and thereby effectively accept the Government's version without any factual details or confrontation through an evidentiary inquiry.

Here as in Malcolm:

"The result of the procedural irregularity is that the sentence rises on a foundation of confusion, misinformation and ignorance of facts vitally material to mitigation. If justice is to be done, a sentencing judge should know all the material facts. The information which was curtailed and precluded here should therefore have been received and considered. Fair administration of justice demands that the sentencing judge will not act or surmise, misinformation and suspicion but will impose sentence with insight and understanding. Harris v. United States, 382 U.S. 162, 166, 86 S. Ct. 352, 15 L.Ed.2d 240 (1965).

The judge, therefore, is required to listen to give serious consideration to any information material to mitigation of punishment. We cannot say that if the judge had acted on the basis of complete and accurate information, verified by the prosecutor, it would have had no mitigating impact on the sentence. This is so although the judge, in his discretion, is not required to lighten the penalty even if there are mitigating circumstances. But no man can make valid judgments without knowledge of the facts. It is thus of no moment that the judge summarily declared that 'he did not care if he helps any body. It does not matter to me.'"

Id. at 815.

Based on the foregoing authority it is respectfully urged that Mr. Landwehr had a right to be given a fair opportunity to meet the adverse report and offer evidence in support of his position on the question of his cooperation. Failure to recognize and permit a defendant to substantiate cooperation through some form of judicial review in an adversary setting renders the sentencing process manifestly unfair to cooperative defendants.

A defendant must be given adequate time to prepare and present a rebuttal to information which he contests. United States v. Rosner, 485 F.2d 1213, cert. denied 94 S. Ct. 3080, 417 U.S. 950, 41 L.Ed.2d 672 (2nd Cir. 1973)). This is especially true where the result may be that the information will in fact demonstrate his cooperativeness and the possibility of mitigating his sentence may be unfairly denied him. A court's failure to take appropriate steps to ensure the fairness and accuracy of the sentencing process must be held to be plain error and an abuse of discretion. See United States v. Robin, 545 F.2d 775 (2d Cir. 1976).

Robin, supra, also involved a dispute as to a defendant's cooperation with authorities. The Second Circuit there found that the defendant was entitled to a reasonable preparation time to rebut material contained in a letter submitted by a state assistant district attorney and that summary denial of a request for an adjournment was reversible error. The court stated:

"Where there is a possibility that sentence was imposed on the basis of false information or false assumptions concerning the defendant, an appeal will lie to this Court and the sentence will be vacated.

Id. at 779.

Further, it was noted by the court that a defendant must be permitted to state his version of the facts to the court, where the possibility of reliance on misinformation is shown. The right of explanation must be extended to permit a presentation of the facts to the court which will enable the sentencing judge to grasp the relevant facts correctly. In Robin, the Court held that the sentencing judge's failure to address any serious consideration to appellant's objections and offer of proof was abuse of discretion amounting to plain error.

In this case, a similar abuse of discretion was present. In the fact of defendant's challenge to the disputed report on cooperation, his counsel asked for a hearing. The court's response to this was merely to announce that the potential "plus" would be a "zero". There was only a bald assertion by the Government of uncooperativeness. The author of the letter, Mr. Arthur Goldstein, failed to appear so that the court might question him on the basis for the assertion. There was no opportunity to question in detail the conclusion and then to present to the court facts concerning the Government's refusal to allow Mr. Landwehr to testify before the federal grand jury in Newark. Nor did the Government give its reasons why Mr.. Landwehr's testimony concerning the facts were not presented to that body despite his earlier willingness. The grand jury is capable of determining for itself the veracity of the witness and the relevance and credibility of his testimony. Rather, the Government did not present him as a witness. There may be a distinct possibility that his evidence was injurious to the

interests of the Government. However, that is clearly not a basis to screen a witness, keep him from the grand jury and then make allegations affecting materially his sentence of uncooperativeness because he desires to proceed to sentence and terminate the uncertainty of his future status. The court's summary refusal to address the issue of cooperativeness and adjudicate same deprived the defendant of the opportunity to present evidence on these unanswered questions. These questions which remain unanswered seriously suggest the possibility that the assertion of uncooperativeness was misinformation or materially untrue. If so, the court's refusal to consider the issue of Mr. Landwehr's cooperation because of the factual dispute created by the Government's allegation in derogation of their commitment to explain "the full nature, extent and value" of the defendant's cooperation, was prejudicial error. The court did not give serious consideration to defendant's objections and offer of proof and thereby abused its discretion.

A rational penal system must have concern for the probable accuracy of the informational inputs in the sentencing process. United States v. Weston, 448 F.2d 626, 634 (9th Cir. 1971). A failure by the trial court to make a conclusive determination concerning the positive or negative affect of the defendant's cooperation with the office of the United States Attorney for the District of New Jersey was prejudicial to the defendant.

The appropriate evidentiary inquiry into dispute need not resemble mini trials. But the process employed by the

trial court to test and resolve factual disputes at sentencing must be serious and substantial. In United States v. Needles, 472 F.2d 652, 657 658 (2nd Cir. 1973) the Second Circuit observed:

"The sentencing process is designed to encourage the court to take into account a broad array of factors of both the crime and the defendant. See Williams v. New York, supra, 337 U.S. at 248 250, 69 S. Ct. 1079. As such it does not lend itself to the procedural formality of a trial; there is no required weight to be allocated to each consideration; proved or disproved; and some come from confidential sources. Hence it has not been required that each statement in a pre sentence report be established or refuted by presentation of evidence. See Id. at 250 251, 69 S. Ct. 1079; but see ABA Project on Minimum Standards for Criminal Justice, Standards relating to Sentencing Alternatives and Procedures section 5.4(b) (App. Draft).

Nonetheless, since sentences should not be based upon misinformation, a defendant should not be denied an opportunity to state his version of the relevant facts, see United States v. Virga, 426 F.2d 1320, 1323 (2nd Cir. 1970), and in some circumstances the probation office or prosecution should be requested to provide substantiation of challenged information submitted to the judge. Likewise, in appropriate instances the defendant ought to be allowed to present evidence in the form of affidavits, documents, or even oral statements by knowledgeable persons on matters the court deems material to its decision on the severity of the sentence. But this court has generally left the decision as to the appropriateness in any particular case of these procedures largely to the discretion of the sentencing judge . . ." (emphasis added).

Simply, in the case the judge improperly and inappropriately excluded mitigating evidence. This court should remand this case for reconsideration of the issue of the defendant's degree of cooperation, requiring the Government to detail its position and permitting the defendant a serious and meaningful opportunity to present his versions.

POINT III

THE DEFENDANT WAS DENIED HIS RIGHTS OF CONFRONTATION AND DUE PROCESS WHEN HE WAS SENTENCED ON THE BASIS OF THE GOVERNMENT'S CONSLUSORY REPORT ON HIS COOPERATION IN THE FACE OF HIS UNRESOLVED CHALLENGE TO ITS ACCURACY AND FAIRNESS.

Failure to permit the defendant to challenge the assertion of uncooperativeness made by the United States Attorney for the District of New Jersey by letter to the trial court was a violation of his Sixth Amendment right of confrontation and Fifth Amendment guarantees of due process.

While a trial judge possesses broad discretion in sentencing and may take into account hearsay and other information that would be inadmissible at trial, recent cases have observed that there is a "clear drift" towards affording a defendant more due process and confrontation rights at sentencing. United States v. Fatico, 22 Crim. Law Reporter 2286 (E.D.N.Y. 1977); See, e.g., United States v. Bass, 535 F.2d 110 (D.C. Cir. 1976); United States v. Weston, 448 F.2d 626 (9th Cir. 1971); See 81 Harv. L. R. 821 (1968).

In United States v. Fatico, *supra*, the District Court for the Eastern District of New York held that it was a violation of the defendant's Fifth Amendment due process rights and the Sixth Amendment's Confrontation Clause to base a critical sentencing decision affecting liberty on information from a person the Government prevents the defendant from examining.

It is submitted that to deny a defendant the right to examine a source of negative information in a presentence report

is analagous to depriving the defendant consideration of a positive, mitigating factor in factual dispute without permitting the defendant the opportunity to examine the source of the contradictory information. The absence of a positive factor is a negative to a defendant who is entitled to that positive factor.

The Fatico court suggests the following test for Sixth Amendment confrontation claims at sentencing:

"The government cannot affirmatively prevent the defendant from examining under oath a declarant when the declarant's knowledge is offered by the government (1) at a critical stage of the criminal process, (2) as to crucial information that, (3) directly affects a substantial liberty interest of the defendant."

Id. at 2288.

Sentencing is a critical, often the most critical stage of the criminal trial process. It is now clear that the sentencing process as well as the trial itself, must satisfy the requirements of due process. The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process. Gardner v. Florida, 430 U.S. 349 (1977); c.f. Witherspoon v. Illinois, 391 U.S. 510, 521, 523. (1967)

Where a defendant is sentenced on the basis of assumptions concerning his criminal record or past acts of cooperation which are materially untrue the sentencing procedure is inconsistent with due process law and may not stand. Townsend v. Burke, 33 U.S. 736, 68 S. Ct. 1252, 92 L.Ed. 1960 (1947).

The test for determining whether the challenged procedure satisfies or denies due process has been phrased in many ways. The questions to be answered here are whether the sentencing process conformed with fundamental principles of liberty and justice which create the base of all our civil and political institutions or whether the procedure was infected with fundamental defects resulting in a miscarriage of justice, and whether it was consistent with rudimentary demands of fair procedures. United States v. Malcolm, 432 F.2d 809 (2nd Cir. 1970).

The refusal to afford an evidentiary inquiry in this case by the trial court was arbitrary and unreasonable. Any reasonable and non-frivolous request for an inquiry into a disputed material mitigating input which the court refuses to hear is arbitrary where there is a possibility such an inquiry will benefit the defendant and mitigate his sentence. Here, the trial court merely turned a blind eye to actions which the courts have long recognized warrant a reduction in the severity of punishment. Denial of this defendant's right to examine the Government on the issue and then present evidence of his own was not consistent with the rudimentary demands of fair procedure. The defendant was denied his right to due process of law and confrontation at his sentencing.

United States v. Needles, 472 F.2d 652 (2d Cir. 1973); United States v. Tucker, 404 U.S. 443 and Townsend v. Burke, *supra*, all recognize a due process right to be sentenced only on information which is accurate. Material false assumptions as to

any facts relevant to sentencing, renders the entire sentencing procedure invalid as a violation of due process. United States v. Needles, supra.

The questionable nature of the Government's letters and his proffer of the circumstances surrounding the defendant's testimony before the grand jury created a sufficient showing to mandate a full and appropriate inquiry by the trial court. The defendant's burden in this regard was discussed in United States v. Rollerson, 491 F.2d 1209 (5th Cir. 1974):

"... this court in United States v. Trevino, 5th Cir. 1973, 490 F.2d 95 denied relief because appellant failed to show reliance by the court on misinformation, and failed to show that the appellant either specifically denied the truth of the information or requested an opportunity for rebuttal. Assuming that each threshold requirement can be satisfied, our decision in United States v. Battaglia, 5th Cir. 1972, 478 F.2d 854, demonstrates that once the possibility of reliance on erroneous information or reliance on an invalid conviction has been raised, an unexplained statement by the court that it would have imposed the same sentence regardless of the original error is insufficient to dispel the lingering doubt that the sentence was founded upon illegitimate considerations. In such cases the defendant must be given an opportunity to rebut the factual error, United States v. Esperroga, (5th Cir. 1973,) 481 F.2d 553." Id. at 1213.

By imposing a three year custodial sentence, the trial court, in effect accepted the Government conclusions with respect to defendant's lack of cooperation. In so doing, the trial court denied defendant his rights of confrontation and due process of law as they have now evolved in the sentencing process.

POINT IV

THE GOVERNMENT'S FAILURE TO REPORT IN DETAIL, FAIRLY AND ACCURATELY, THE "FULL NATURE, EXTENT AND VALUE" OF DEFENDANT'S COOPERATION CONSTITUTED A BREACH OF THE PLEA AGREEMENT REQUIRING VACATION OF SENTENCE AND REMAND FOR SPECIFIC PERFORMANCE OF THIS ASPECT OF THE PLEA AGREEMENT.

The plea of guilty by defendant Landwehr to one count of this multi-count indictment was the product of extensive negotiations. A carefully drafted plea agreement was presented to the court at defendant's plea and duly filed with the clerk. Paragraph VI of that agreement reads as follows:

"The United States of America, prior to the time of sentencing, will advise the Court and the defendant of the full nature, extent and value of the cooperation given by defendant PHILIP LANDWEHR to the United States of America."

By the terms of the plea agreement, defendant was obliged to "cooperate forthwith" and to provide "complete, candid and truthful information" to the assistant United States Attorneys in both the Southern District of New York and the District of New Jersey. If the Government was dissatisfied with his observation of this condition, it was free to rescind the plea agreement, permit a retraction of the plea of guilty to the single count and defendant would have been obliged to go to trial on all counts of both indictments. The defendant even agreed to waive his privilege against self-incrimination in that event with respect to any disclosures and statements of an incriminating nature which he had made prior to the rescission. (Da-17 to 20)

Despite these provisions and the Government's conclusion that Landwehr had been "extremely uncooperative", the government did not seek to rescind the plea agreement, nor did it report as required "the full nature, extent and value" of defendant's cooperation. Instead, the Court was furnished just prior to sentencing with an altered form of an earlier favorable letter, stating the aforementioned unfavorable conclusion, without any detail or information regarding "the full nature and extent" if not the "value" of his cooperation. Had the Government done so the Court would have learned from the Government that (1) the defendant had many meetings, at length, with the Governmental attorneys and investigators; (2) the defendant had agreed to testify before a federal grand jury in the District of New Jersey and indeed the Government had sought and obtained permission to confer immunity upon him in connection with that testimony; (3) the defendant was scheduled to testify before that grand jury only a few days prior to the sentencing proceeding but this session was cancelled by the Government in view of the sudden contract type homicide of another witness in the same investigation a few days prior to this date; (4) the Government had offered the defendant protection from possible harm (which he declined) and requested that he postpone indefinitely his sentencing until after he was able to testify before the grand jury. The defendant, anxious to terminate the matter desired to be sentenced on November 21, 1977 on his August 16, 1977 plea. It was solely in this respect that he was "extremely uncooperative".

although he held himself available after sentencing to testify in any grand jury proceeding to which he was subpoenaed and immunized. Even with sentencing first and grand jury testimony later, the Government's interest in defendant's candor would still be assured by the availability of contempt proceedings or a perjury prosecution if he became uncooperative or gave false testimony. Although the defendant's version would have admitted some initial hesitancy and lack of full cooperation in his first meetings, the defendant would have maintained that he did cooperate to the best of his ability, was truthful, and would so testify before the grand jury. Although most of this was suggested to the trial court by defendant's counsel by way of a proffer, the Government's report of same would have carried much more weight with the trial court and the proffer was summarily dismissed by the court's purported disregarding of the factor. "I put that letter aside." (T 89, 9). Respectfully it is suggested that such a response did not comport with the plea agreement and together with the Government's failure to carry out its promise of full reporting, constituted a gross denial of the benefits he should have derived as a cooperating defendant from his plea agreement. The court acknowledged that a favorable report from the Government with respect to defendant's cooperation would have "helped" defendant in his sentence. (T 88, 20-25) Instead the negative report was treated as a "zero". The Court assumed that to disregard the issue was to "neutralize" the impact that cooperation would have had on defendant's sentence.

As is argued at length supra, that assumption is a false one. The court's sentencing procedure did not give the defendant the credit his cooperation would have entitled him to and further the court assumed that to merely disregard the issue would have had no negative impact upon defendant's sentence. The negative impact of not having a positive "plus" is obvious and the court recognized as much by noting that the "plus" may have helped the defendant i.e. the custodial term would have been less with a favorable letter (or perhaps he would have received probation as had the other two co-defendants with favorable records of cooperation).

The Government's failure to honor its plea agreement mandates a vacation of the present sentence and a remand for specific performance of the plea agreement. Santobello v. New York, 404 U.S. 257 (1971). United States v. Alessi, 536 F.2d 978 (2d Cir. 1976). Rescission is no longer viable since defendant has served a substantial portion of his sentence. It is, of course, recognized now that open disclosure of all plea agreements is essential to the proper administration of criminal justice. Federal Rule of Criminal Procedure 11(e)(c)(2) provides:

"If a plea agreement has been reached by the parties, the court shall require the disclosure of the agreement in open court . . ."

In United States v. Scharf, 551 F.2d 1124 (8th Cir. 1977) the failure of the district court to develop the terms of the bargain at sentencing required remand for an evidentiary hearing

to determine the exact nature of the plea. Although the Court of Appeals did not reach the question of breach, noting that "there is no question that a breach of a plea bargain by the government, if established may entitle a defendant who has pleaded guilty in reliance on the bargain to appropriate relief," they emphasized the importance of full disclosure and compliance with Rule 11(e) procedures in regulating plea bargaining and eliminating problems and abuses in the plea bargaining system.

But even more important than full disclosure is strict observance by the Government of the terms of its plea agreements. Santobello v. New York, 404 U.S. 257 (1971). In Santobello the violation of the plea agreement was a prosecutor's recommendation of the maximum one year term in the face of an agreement to make no recommendation with respect to sentence. The trial court had stated that it would not have been influenced by a "no recommendation" position of the state. Nevertheless the Supreme Court reversed, finding that the trial court's remarks did not cure the violation of the plea agreement, that the reasons for the breach were irrelevant and that remand was necessary in order to enforce "the duties of the prosecution in relation to promises made in negotiation of pleas of guilty." 404 U.S. at 262. Likewise here it matters not that the trial court may not consciously have punished defendant for his lack of cooperation.

In addition the plea bargain agreement includes an implied promise to support the recommendation or agreement entered into with some degree of advocacy. In United States v. Brown, 500

F.2d 375 (4th Cir. 1974) the Court of Appeals reversed a district court's sentence finding that the halfhearted recommendation of sentence by the prosecutor, which it had agreed to recommend, constituted a failure to live up to the plea bargain. The defendant, Brown was indicted for forgery and stolen mail and entered into a plea agreement in consideration of dismissal of the forgery charge and a recommendation of a three year sentence to be served concurrent to a parole violation at Lorton. At sentencing, the prosecutor made the recommendation and then stated that he did not believe it was the appropriate sentence but that it was part of the plea bargain. Defendant received a four year sentence without arrangements being made for incarceration at Lorton. Holding Santobello to be controlling the court found that fairness requires that when a guilty plea "rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration such promise must be fulfilled." The court included as part of the consideration for the plea an implied promise that the prosecutor would "make a recommendation with some degree of advocacy." 500 F.2d at 377. Therefore the prosecutor, having failed to fulfill the promise breached the plea bargain and the relief sought, specific performance, was granted.

The Fourth Circuit applied its decision in Brown to a factual situation similar to the present case in United States

v. Simmons, 537 F.2d 1260 (4th Cir. 1976). The defendants entered into a judicially approved plea bargain, whereby the prosecution in exchange for defendants' full, complete and truthful cooperation would recommend a fifteen year sentence. The prosecution determined that defendants had not made full disclosure and unilaterally changed the plea agreement. The court imposed sentences of eighteen years. The Court of Appeals reversed, agreeing with defendants contention that it is the Court which must determine whether the bargain was breached. The Court remanded for resentencing holding that "manifest impropriety" would result in permitting the government, without satisfying a judge that the evidence proves that defendant broke his promise, to escape their obligation under the plea agreement. By their actions in the present case the government has behaved in exactly such a manner. They had apparently unilaterally determined that Landwehr's refusal to indefinitely postpone his sentence until, in their opinion, he could testify safely before a grand jury caused him to become "extremely uncooperative" in their eyes.

The courts of this circuit have been equally as demanding in following strictly the Santabello requirement of fulfillment of plea bargained promises. In Palermo v. Warden, Green Haven State Prison, 545 F.2d 286, (2nd Cir. 1976), writs of habeas corpus were granted by the District Court of the Southern District of New York because of prosecutorial non fulfillment of a plea bargain and the government appealed. Petitioners, two inmates at Green Haven State Prison, had been arrested for a jewelry

robbery committed during their trial for a previous robbery from which they were convicted. They were sentenced on the first robbery and entered into a complex plea agreement concerning the second robbery which required their return of the jewels. Some of the plea promises included "early parole consideration". In granting the writs the district court found that the prosecutors had no assurances from the parole board and that although the prosecutor publicly asked for early parole due to cooperation, the prosecutor privately (during phone conversations with the parole board) stated that defendants merited no consideration, in violation of the plea agreement. The Court of Appeals affirmed finding that "the reasoning underlying Santabello applies no less when the prosecutor makes unfulfillable promises (i.e. to control the Parold Board) in negotiating a plea". The Government in the present case has created unfulfillable obligations on defendant's part in order to defeat their plea obligation.

There was in fact no bargain to postpone sentencing in order to assure defendant's grand jury testimony. Yet due to the fortuitous adjournment of the grand jury meeting, and defendant's consequent decline of adjournment of sentence the government has labelled defendant "uncooperative," despite the numerous conferences with the government and his willingness to testify after sentence. By the same reasoning a prosecutor makes promises unfulfillable when he gives no indication of how the terms of the agreement can be fulfilled by the defendant.

The Government here has failed to meet its plea bargain obligations in every step. They have not fully disclosed the exact nature and value of defendant's cooperation; they did not keep their agreement in exchange for defendants cooperation, information and candid meetings with the Government and lastly they have failed to make any attempt to define to the court exactly what positive cooperation has been provided by the defendant or in what ways the defendant has breached his agreement. The Government's failure to make a detailed report and the failure to make an accurate and fair report constituted a serious, prejudicial and unjustified violation of its plea agreement with the defendant and requires a remand for resentencing.

CONCLUSION

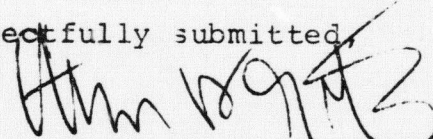
Defendant was sentenced to a term of incarceration for bankruptcy fraud twice as long as any other defendant in the matter. Two other "cooperating" defendants received probationary terms. Defendant was reported by the Government to be "extremely uncooperative" despite his many meetings with the Government and his willingness to testify before a federal grand jury as to matters within his knowledge under investigation. Although the trial court denied punishing defendant for his lack of cooperation, the court acknowledged that because of the Government's unfavorable report, he did not receive the "plus" that he could have received towards leniency. Respectfully it is urged that it was unfair and improper to resolve the factual dispute about his cooperation in this manner. If he was deprived of a "plus" that he had earned, then its denial due to the Government's challenged report, constituted an aggravation rather than a mitigation of his sentence.

Beyond the procedural unfairness of the trial court's approach is another independent ground for vacation of this sentence. To the extent that the Government was obliged by its plea agreement to make a detailed, accurate, and fair report to the court on the defendant's cooperation, its failure to do so constituted a violation of his plea agreement.

Defendant's disputation of the Government's report on his cooperation thus mandated an inquiry by the trial court to insure that the Government had honored its plea agreement.

For the foregoing reasons, it is respectfully submitted that defendant's sentence should be set aside and the matter remanded for re-sentencing where the factual dispute as to the "full nature, extent and value" of defendant's cooperation will be properly developed in an evidentiary hearing and a proper sentence imposed that reflects his favorable cooperation. Since the trial court has already expressed its sentencing view, the interests of fairness would suggest that the re-sentencing be assigned to another trial court.

Respectfully submitted,


Steven H. Gifis, Esquire
68 Bayberry Road
Princeton, New Jersey 08540
(609) 466-3550

February 7, 1978

STEVEN H. GIFIS
ATTORNEY AT LAW
68 BAYBERRY ROAD
PRINCETON, N. J.
08540
(609) 466-3550

Steven H. Gifis, Esq.
68 Bayberry Road
Princeton, New Jersey 08540

IN THE

United States Court of Appeals

DOCKET NO. 77-1493

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

vs.

PHILIP LANDWEHR,

Defendant-Appellant

STATE OF NEW JERSEY)
)
COUNTY OF MIDDLESEX)

PROOF OF SERVICE

I, RONALD D. ANZIVINO, of full age, being duly sworn according to law upon my oath, depose and say:

1. I am the President of New Jersey Appellate Printing Co., Inc., a New Jersey corporation, the principal place of business of which is located at 177 Ryan Street, South Plainfield, New Jersey

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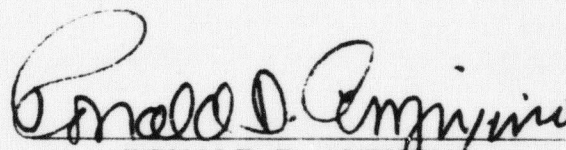
2. On the 9th day of February 1978, I placed in the Post Office at South Plainfield, New Jersey, a package containing

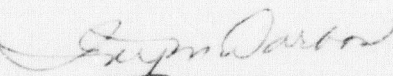
Two (2) Copies Brief

first class mail, addressed:

T. Barry Kingham, Executive Assistant, United States Attorney,
Southern District of New York, One St. Andrews Plaza, New York,
New York 10007 2 Copies

Sworn and subscribed to
before me this 9th day
of February 1978.


RONALD D. ANZIVINO


IVY M. DARBOS
Notary Public of New Jersey
My Commission Expires May 12, 1981